S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

FIVE STAR REAL ESTATE, LLC,

Plaintiff-Appellee/Cross-Appellant,

UNPUBLISHED
May 11, 2006

v

No. 258602
Kent Circuit Court
LC No. 03-009545-CZ

KEMPER CASUALTY INSURANCE COMPANY,

Defendant-Appellant,

and

CONTINENTAL CASUALTY COMPANY,

Defendant/Cross-Appellee.

Before: Meter, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant, Kemper Insurance Company, appeals by right the circuit court's grant of plaintiff, Five Star Real Estate, LLC's, motion for summary disposition on the ground that Kemper breached its duties to defend and indemnify Five Star in two underlying suits against it. Five Star cross-appeals the circuit court's grant of defendant, Continental Casualty Company's (CNA), motion for summary disposition on the basis that Five Star's special property and business liability policies afforded them no coverage. We affirm.

Five Star was named as a defendant in two underlying suits that alleged a Five Star employee and another individual committed various wrongful acts in connection with certain real estate transactions. The underlying complaints alleged counts directly against Five Star of negligence, actual fraud, breach of fiduciary responsibility and conversion, vicarious liability, violation of the Michigan Consumer Protection Act, and violation of Real Estate Brokers and Salespersons Act. Five Star filed insurance claims with both defendants based on several insurance policies. Both defendants denied coverage and refused to defend Five Star in the underlying suits. Five Star subsequently settled the underlying suits on the negligence counts alone, and the remainder of the counts were dismissed. It then filed suit against defendants, seeking indemnification. The trial court granted summary disposition in favor of CNA against plaintiff but granted summary disposition in favor of plaintiff against Kemper.

We review rulings on motions for summary disposition de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463, 469; 663 NW2d 447 (2003). Additionally, issues involving the interpretation of insurance contracts are also reviewed de novo. *Id*. Summary disposition of all or part of a claim may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). Regarding an insurance contract, "if a word or phrase is unambiguous and no reasonable person could differ with respect to application of the term or phrase to undisputed material facts, then the court should grant summary disposition to the proper party pursuant to MCR 2.116(C)(10)." *Henderson v State Farm Fire & Casualty Co*, 460 Mich 348, 353; 596 NW2d 190 (1999). Clear exclusions are to be given effect, but are strictly construed in favor of the insured. *McKusick v Travelers Indemnity Co*, 246 Mich App 329, 333; 632 NW2d 525 (2001). The insured bears the burden of proving coverage but the insurer bears the burden of proving that an exclusion to coverage is applicable. *Heniser v Frankenmuth Mutual Ins*, 449 Mich 155, 161 n 6; 449 NW2d 502 (1995).

Kemper first argues on appeal that Five Star's coverage under an "errors and omissions policy" was precluded because the underlying claims were based on or arose out of conduct excluded in the policy. Specifically, Kemper relies on the following exclusion:

> This policy does not apply to any **claim**:
>
> * * *
>
> D. Based on or arising out of:
>
> 1. The conversion, commingling, defalcation, misappropriation or improper use of funds or other property;
>
> * * *
>
> 3. The inability or failure to pay collect or safeguard funds held for others.

Kemper argues that the underlying negligence complaints against Five Star were solely for negligent supervision and training, which negligence was based on and arose out of the wrongful acts of the Five Star employee and his partner. We disagree.

An insurer's duty to indemnify does not depend solely on the terminology used in a plaintiff's pleadings. *Allstate Ins Co v Freeman*, 432 Mich 656, 662; 443 NW2d 734 (1989), modified sub nom *Metropolitan Prop & Liability Ins Co v DiCicco*, 433 Mich 1202 (1989). "Rather, 'it is necessary to focus on the basis for the injury and not the nomenclature of the underlying claim in order to determine whether coverage exists.'" *Id.* at 662-663, quoting *Illinois Employers Ins of Wausau v Dragovich*, 139 Mich App 502, 507; 362 NW2d 767 (1984). The allegations must be examined to determine the substance of the complaint. *Id.* The underlying complaints here alleged negligent supervision, training, and misrepresentation. The complaints alleged that plaintiff misled the underlying plaintiffs and the general public by representing that their employee's partner was a licensed real estate agent and employee or affiliate of Five Star. It also misled the underlying plaintiffs and public by procuring business cards for and sharing referrals with the assistant. Where acts of negligence are alleged, they are considered to be "based on and arise out of" the underlying torts of others only when the negligence is not triggered until the underlying tort is committed. *Allstate, supra* at 690-691. Here, it was not necessary that its employee and his agent commit any of the underlying wrongful conduct to trigger Five Star's negligence. There was negligence based on plaintiff's conduct alone.

Additionally, while the underlying claims allege acts of misappropriation and defalcation, which the policy excludes, the majority of the claims allege misrepresentations or concealment of material facts upon which the underlying defendants relied to their detriment. The majority of the underlying claims appear to be based in fraud, which the policy does not exclude. Kemper has not met its burden of proving that an exclusion to coverage is applicable. *Heniser, supra* at 161 n 6. Summary disposition was properly granted against Kemper in favor of plaintiff.

On cross-appeal, Five Star argues first that it had coverage under its special property policy with CNA. It claims that the policy's employee dishonesty extension provided coverage because Five Star suffered a loss as a result of its employees' dishonesty. We disagree because there was no evidence that the causal dishonest acts were intended to cause Five Star to sustain a loss. The extension, according to its explicit language, therefore did not apply.

To determine whether an event is covered by a liability insurance policy, a court must first consider whether the event is within the scope of the policy coverage before considering whether the event is otherwise excluded by the policy. *Fire Ins Exchange v Diehl,* 450 Mich 678, 683; 545 NW2d 602 (1996), overruled in part on other gds *Wilkie v Auto-Owners Ins Co,* 469 Mich 41; 664 NW2d 776 (2003). A policy's language is to be given its ordinary and plain meaning, and technical and constrained constructions should be avoided. *Singer v American States Ins,* 245 Mich App 370, 374; 631 NW2d 34 (2001). Thus, the terms of an insurance policy are given their commonly used meanings, unless clearly defined otherwise in the policy. *Group Ins Co v Czopek*, 440 Mich 590, 596; 489 NW2d 444 (1992).

The employee dishonesty coverage extension at issue provided that CNA would

> pay for direct loss of or damage to Business Personal Property, including "money" and "securities", resulting from dishonest acts committed by any of your employees acting alone or in collusion with other persons (except you or your partner) with the manifest intent to:
>
> (a) Cause you to sustain loss or damage . . .

It is the insured's burden to establish that his claim falls within the terms of the policy. *Heniser, supra* at 161 n 6. Five Star has failed to meet that burden because it has not shown that the dishonest acts at issue were manifestly intended to cause it to sustain a loss or damage.

Five Star additionally argues on appeal that it was covered by CNA under a business liability policy. That policy provided that CNA would,

> pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury", "property damage", "personal injury" or "advertising injury" to which this insurance applies.

Property damage is defined in the policy as:

> a. Physical injury to tangible property, including all resulting loss or use of that property. . . . or
>
> b. Loss of use of tangible property that is not physically injured.

Five Star maintains on appeal that its monetary loss, the payment of damages in the underlying suit, is a loss of tangible property because money can be easily identified and appraised at an actual value. We disagree. As CNA notes, the value of a bank account cannot be touched and is not a physical object. Further, our Supreme Court has noted that bank deposits are intangible property. *Chicago, Duluth & Georgian Bay Transit Co v Corp & Securities Comm*, 319 Mich 14, 27; 29 NW 303 (1947). Five Star's obligation to pay money damages from their bank deposits is clearly intangible property; therefore, Five Star had no coverage under the relevant policy.

We affirm.

/s/ Patrick M. Meter
/s/ Joel P. Hoekstra
/s/ Jane E. Markey